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**PROPOSAL TO AMEND QUALIFICATIONS OF NAVAJO NATION JUSTICES MAY
UNDERMINE TRIBAL SOVEREIGNTY**

The Judicial Branch has issued comments on proposed amendments to the qualifications of Navajo Nation Supreme Court justices at 7 N.N.C. § 354 (B) that have been submitted to the Navajo Nation Council legislative process through Legislation No. 0388-11.

The amendments were developed without prior input from the Navajo Nation Judicial Branch and would dictate that Supreme Court justices must have a juris doctor degree and must also have a license to practice law from a state bar association.

Chief Justice Herb Yazzie expressed concerns that the proposed requirements will achieve the opposite of the increased competence that is being sought for the Navajo Nation court system. "In our struggle to create a unique tribal jurisprudence, we have sought to distinguish ourselves from the state and federal systems. More and more, we have relied on our unique sovereign perspectives on dispute resolution, law and public order. We oversee a living tribal justice system reflecting the importance of our tribal community, not a borrowed state or federal system in which our culture is merely anthropological speculation," Chief Justice stated.

Current law requires that Navajo Nation judges and justices be well-versed in Diné laws, traditions and customs, which are the basis of the Diné Fundamental Law and common law. However, the proposed amendments would likely create candidates for Supreme Court justice whose only expertise is in external (non-Navajo) laws which would result in diminished expertise in Navajo Nation sovereign laws.

The emphasis of the Navajo Nation government in Title 7 of the Navajo Nation Code is that sovereign laws are applied first and federal and state laws second. Over the decades, Navajo Nation law has evolved to include core concepts of Diné justice with a Code that consists of 26 Titles and fundamental law.

The Navajo Nation court system has long been regarded as a leader in tribal jurisprudence, and continues to be so regarded. A recent Navajo Nation Supreme Court opinion in John Doe BF v. Diocese of Gallup drew further praise for the Navajo Nation judicial system, most notably from

renowned tribal jurist and law professor Matthew Fletcher who stated that the opinion “demonstrates why the Navajo judicial system is a leader in tribal court adjudication.”

Chief Justice Yazzie stated that there is no doubt the cultural approach in tribal court systems throughout the United States has been eroded and largely replaced by non-Indian jurisprudence. “We, as leaders in the area of tribal court adjudication, cannot be part of that erosion,” he stated.

“We have a heightened duty to safeguard the sovereign entity of the Navajo Nation and maintain our people as a cohesive cultural group. We have a duty to ensure that the policy of tribal sovereign authority on our own terms in the Indian Self-Determination and Education Assistance Act of 1975, is sustained. The Self-Determination Act assumes that tribes will take the opportunity to develop unique tribal laws and government, based on our own terms,” Chief Justice Yazzie stated.

In EXC v. Kayenta District Court, the Navajo Nation Supreme Court described Navajos as proud Americans, whose tribal laws are a heritage of the American people as a whole:

In this day and age, the Navajo People are proud American citizens, having served in several wars, swearing oaths of loyalty to the United States in our schools, and leaving the reservation to participate in state and federal governments or take other important roles in mainstream society . . . Our laws, although indigenous and extra-Constitutional, are American domestic laws that will endure for future generations through the Federal policy of Indian self-determination. Our laws reflect our indigenous cultures and practices. They are vital to the survival of our culture, which is not only a Navajo heritage, but a heritage of the American people.” No. SC-CV-07-10, slip op. at 22 (Nav. Sup. Ct. September 15, 2010).

While the proposed legislation cites the Tribal Law and Order Act of 2010 as requiring a judge presiding over criminal proceedings to have sufficient legal training to preside over the proceeding and be licensed to practice law by any jurisdiction in the United States, the Chief Justice states that language was crafted to recognize that tribal bar memberships, such as the Navajo Nation Bar Association, are sufficient in keeping with the treatment of tribes as sovereign entities exercising sovereign powers. The TLOA requires that the presiding judge have sufficient legal training in the application of tribal law, not state and federal law.

“In short, there is no TLOA requirement that a tribal judge at any level be state-barred or possess a J.D. In fact, the emphasis is on the exercise of inherent sovereign authority,” Chief Justice Yazzie stated. The Judicial Branch was part of an inter-tribal work group whose recommendations were largely implemented by the Senate drafters of the TLOA.

Judicial Branch Human Resources Director Darren Tungovia has also expressed concerned that the proposed state bar qualifications in addition to the present requirements for knowledge of Diné language and culture will diminish an applicant pool that is already very small.

Other present requirements under Title 7 are that a justice must be a member of the Navajo Nation Bar Association, must possess a bachelor’s degree from an accredited institution of

higher education at minimum – with preference of a J.D. or LL.M. – and must have at least four years direct work experience in a law related area and a working knowledge of Navajo and applicable federal and state laws. While on the bench, justices must continue to meet annual training requirements.

Both Chief Justice and Mr. Tungovia are calling for the legislation to be delayed until a study is conducted to determine how many Navajo Nation Bar Association members speak the Diné language; have sufficient knowledge of Diné traditions, customs and culture in order to base a unique Navajo jurisprudence on that knowledge; and are also state-licensed practicing attorneys.

Finally, both comments submitted by the Chief Justice and Mr. Tungovia, respectively, noted that there is no formal qualification under the U.S. Constitution that requires judges on the federal bench, including U.S. Supreme Court justices, to possess active bar licenses.

Public comment on the proposed Navajo Nation Council legislation ends September 24, 2011. A copy of the proposed legislation may be accessed from www.navajonationcouncil.org.

A copy of Chief Justice's comments may be accessed at www.navajocourts.org.

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